Supreme C...
FILED
05-245 JUN 28 2005
OFFICE OF THE CLERK

In the

# Supreme Court of the United States

PAUL D. KERIAN, *PETITIONER*

*Versus*

LOUIS CALDERA, SECRETARY OF THE ARMY, et al., *RESPONDENT(S)*

**On Petition for A Writ of Certiorari to the United States Supreme Court of Appeals for the Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

PAUL D. KERIAN, Pro Se
195 E. Argyle St.,
Valley Stream, NY 11580
Tel. (516) 792-6500

## QUESTIONS PRESENTED FOR REVIEW

1. Where "military" activities violate the Geneva Conventions, federal law and/or military regulations, do textual commitments in the U.S. Constitution limit members of the U.S. military's right to Due Process, judicial review and forms of relief such as, civil rights protection, class action certification and the protection of customary international law?

2. Where Petitioner reported war crimes and advised superiors of his intent to report war crimes, was Petitioner entitled to whistleblower protection to include administrative and judicial review under the "preparing" to contact Congress language in 10 USC 1034?

3. Where Petitioner diligently pled and pursued administrative and judicial remedies, where the Military violated Federal statutes, its own regulations, and where the Military acted in bad faith in its investigation of whistle blower reprisal and war crimes, did the lower court commit reversible error when it pre-terminated Petitioner's claims or in ruling challenge of unlawful discharge was barred by the statute of limitations?

**PARTIES TO THE PROCEEDINGS:** The parties to this proceeding are, the Petitioner, Pro Se, Paul D. Kerian and the Respondent(s) in their representative capacities: The Honorable George W. Bush, President of the United States; The Honorable, Donald Rumsfeld, Secretary of Defense (DOD); and, The Honorable, Francis Harvey, Secretary of the Army.

**TABLE OF CONTENTS:** Page

QUESTIONS PRESENTED FOR REVIEW .....i
PARTIES TO THE PROCEEDINGS..... ..ii
TABLE OF AUTHORITIES AND STATUTES.....ii -v
CONSTITUTIONAL PROVISIONS ..... v
OPINIONS BELOW..... 1
JURISDICTION..... 2
ARGUMENT.....3-30
CONTENTS OF APPENDIX.....31-32

**TABLE OF AUTHORITIES AND STATUTES:**
**UNITED STATES CONSTITUTION:**

U.S. Const., Article 3, cl. 2..... v, 7, 20
U.S. Const., Article 6, cl. 2..... v, 3, 20
U.S. Const., Fifth Amendment..... v, 10

**STATUTES**

Jurisdiction, 28 USC 1254; 28 USC 1331.....vi, 9
War Crimes, 18 USC § 2441.....3
Soldiers' and Sailors' Civil Relief Act,
50 U.S.C. 501 to 593.....7
The Uniformed Services Employment and Reemployment
Rights Act USERRA, 38 U.S.C. 4301-4333.....7
Correction of Military Records, 10 USC §1552.....14, 26
Military Whistle Blower
Protection, 10 USC § 1034.....1,8,11,14,23
Judicial Review, 10 U.S. C. 36 Sec. 628 (g) (i) .....26
Conspiracy to impede or injure officer, 18 USC § 372.....20
Conspiracy to interfere with civil rights, 42 USC 1985.....8

Administrative Procedures Act, 5 USC § 706 .....7
The Privacy Act of 1974, 5 U.S.C. § 552a.....vi, 7
Freedom of Information, 5 U.S.C. §§ 552a .....vi, 7

**LAWS / FEDERAL RULES/TREATY IN FORCE:**

97 CONG. REC. 3775, 3776 (1951) .....26
Fed.R.Civ.P.12(b)(6).....12
Fed R.Civ. Proc. 40.....4
Fed R.Civ. Proc. 56.....12
Geneva Convention (IV) relative to the Protection of Civilian Persons in Times of War, Geneva, 12 August 1949.....3, 6, 8, 13, 24
Protocol Relating to the Status of Refugees, Nov. 1, 1968, Ch. 3., Art. 1, Sub. F, 19, U.S.T. 6223.....4

**MILITARY REGULATIONS:**

DoD Directive 5100.77, DoD Law of War Program, December 9, 1998.....5, 15
DoD Directive 7056.6, Military Whistleblower Protection, November 20, 1989.....9,14
Army Regulation 15-185, Army Board for Correction of Military Records, Feb. 29, 2000.....10,18,20
Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 5810.01B, 25 March 2002.....5, 15

**CASE LAW:**

Application of Yamishita, 327 U.S. 1 (1946) .....22,29
Bailey v. Glover, 88 U.S. (21 Wall.) 342,347 (1874).. .....30
Blassingame v. Secretary of Navy 866 F.2d 556 (2d Cir. N.Y. 1989).....3, 17, 26, 28
Blyden v. Mancusi, 186 F .3d 252, 269 (2d Cir. 1999).....9
Bittner v. Sec. Def., 625 F. Supp 1022 (D.D.C. 1985).....28
Burns v. Wilson, 346 U.S. 137 (1953).....10
Chappell v. Wallace, 462 U.S. 296 (1983).....,9
Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976) .....6,11
Dibble v. Fenimore, 339 F.3d 120, 126, 126-128 (2d Cir. 2003).....5,6
Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981).....5

Dunlap v. Tennessee, 514 F.2d 130, 133 (6th Cir. 1975).....5
Emory v. Sec. Navy, 819 F.2d 291, 293-94 (D.C. Cir. 1987).....5
Feliciano v. Laird, 426 F.2d 424 (2d Cir 1970).....10
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. N.Y.) 154 (D. C. 1986).....10
Geyan v. Veterans of America v. Secretary of the Navy, 642 F. Supp. 154 (D.D. C. 1986) .....28
Goldman v. Weinberger, 475 U.S. 503 (1986).....5
Guerrero v. Marsh, 819 F. 2d 238 (9th Cir. 1987).....28,29
Harmon v. Brucker, 355 U.S. 579 (1958) (per curiam).....10
Holmberg v. Armbrecht, 327 U.S. 392 (1946).....29
In re S. African Apartheid Litig, 46 F. Supp. 2d 538, (S.D.N.Y. 2004).....9
I.N.S. v. Stevic, 467 U.S. 407 (1984).....4
Jones v. New York State Div. of Mil. and Nav. Affairs, 166 F.3d 45, 52, 54 (2d Cir. 1999).....5
Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 102 n.5 (3d Cir. 1986). .....6
Knutson v. Wisconsin Air Nat'l Guard, 995 F.2d 765, 768 (7th Cir. 1993).....6
Kries v. Sec'y of the Air Force, 866 F.2d 1508, 1513 (D.C. Cir. 1989)..... 6,9
Kurlan v. Callaway, 510 F.2d 274, 280 (2d Cir. 1974).....5
Lapin v Taylor, (1979, DC Hawaii) 475 F Supp 446.....7
Lunquisist v. Sec. Pac. Auto. Fin. Servs. Corp. , 993 F. 2d 11, 14 (2d Cir. 1993).....9
Mindes v. Seaman 453 F.2d 197 (5th Cir. 1971).....5
The Paquete Habana 175 U.S. 677, 700 1900).....10
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 119 (1984).....5
Presbyterian Church of Sudan v. Talisman Energy, Inc, 244 F. Supp. 2d 289 (S.D.N.Y.2003).....10
Robinson v Metro North Commuter Railroad, 267 F.3rd 147, 162 [2d Cir. 2001].....9
Scheuer v. Rhodes, 416 U.S. 232, 236, 94 1979).....20

Scott v. Rice, No. 92-2463, 1993 U.S. App. LEXIS 24641 (4th Cir. Sept. 23, 1993) .....5
Smith v. Resor, 406 F.2d 141 (2 Cir.1969).....8, 11
Smith v. Marsh, 784 F. 2d 499 (3d Cir.1986).....28
United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, (1954).....8
Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Co.(In re Agent Orange Prod. Liab. Litig.).. (E.D.N.Y. Mar. 10, 2005).....9
Walden v. Bartlett, 840 F.2d 771 (10th Cir. 1988).....6
Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989).....9
Winters v. United States, 89 S. Ct. 57, 59-60 (Douglas, Circuit Justice 1968).....9
Zipes v. Trans World Airlines Inc., 455 U.S. 385, 393 (1982).....29

**SECONDARY SOURCES:** Article: United Nations and The Geneva Conventions by Roy Gutman, .....29

**CONSTITUTIONAL PROVISIONS**

**[....( U.S. Const., Article 3, cl. 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made....")....**

**....(U.S. Const., Article 6, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.....")...**

**...(U.S. Const., Fifth Amendment. "No person shall . . . be deprived of life, liberty, or property, without due process of law.")....]**

## CITATIONS TO ADMINISTRATIVE AND JUDICIAL OPINIONS

The executive branch administrative legal process appealed from is unpublished and appended at APP E-K (A64-A155). The memorandums of opinion of the Federal District Court for the Eastern District of New York (EDNY) are unpublished and appended at APP A&B (A1-A59). The decision and denial of rehearing (suggested en banc) of the United States Court of Appeals for the Second Circuit are unpublished and may be found at APP C & D (A60-A64)

## JURISDICTION

In a Revised Memorandum and Order, dtd October 28, 2003, DJ Trager, in The Federal District Court for the Eastern District of New York, finally modified his earlier Revised Memorandum and Order APP A, (A1-A44) and dismissed all Petitioner's complaints while denying leave to amend. APP B, (A45-A59). On December 9, 2004 United States Court of Appeals for the Second Circuit summarily affirmed. APP C, (A60-A62). Reconsideration (suggestion en banc) was denied March 31, 2005. APP D, (A63-64). This appeal was timely filed (w/i 90 days) with jurisdiction provided by 28 USC 1254 (1). Federal Questions (28 USC §1331) provided subject matter jurisdiction at the initial trial Court level along with The Administrative Procedures Act 5 USCS § 706, APP W, (A298) and other basis detailed in Petitioner's amended complaint at APP AA, (A344-A384).

## STATEMENT OF THE CASE

Only the Supreme Court can resolve the legal matters that Petitioner presents because Executive Branch misconduct and judicial abstention have created an environment where Treaties, Federal law, fundamental human rights and Supreme Court precedent are flagrantly disregarded with impunity.

To deny review of Petitioner's complaint as time-barred and non-justiciable by sustaining the EDNY and the Court of Appeals b/ . ngs deprives Military service members of Constitutio statutory and regulatory protections. To deprive judicial review is to deprive military service members of any meaningful protection when they refuse to obey unlawful military orders.

## REASONS FOR GRANTING THE PETITION

Supreme Court review could resolve conflicts between Federal Circuits on review-ability of military decisions as well as conflicts between the Federal Circuits on appropriate types of relief (equitable relief, civil rights protection, class action protection) available in military cases. Supreme Court review is also necessary because judicial process and proceedings to date entail judicial conduct that has so far departed from accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. Executive branch misconduct and judicial abstention of record together describe a war crime facilitative environment that disregards, treaty obligations, military regulations, military service member rights, and the rule of law.

The record shows multiple instances of Executive branch failure to follow the U.S. Constitution, Federal laws (statutes) and the Geneva Conventions (not self-executing) even though implemented (executed) by military regulations:.....**pg 8**

A. Disregard of Whistle blower regulations.....**pg 11**
B. Disregard for Law of War Regulations.....**pg 15**
C. Disregard for ABCMR Regulations.....**pg 17**

10 USC 1034 protects Military whistle blowers even those "preparing" to blow the whistle.....**pg 18**

Contrary to the EDNY dismissal, 10 USC 36 sec 628 (g) (i) specifically provides for judicial review of "military"

decisions, such as the supplemental whistle blower reprisal heaped upon Petitioner by the Army Special Review Board (SRB) hearing his efficiency report appeal.....**pg 26**

Clearly erroneous rulings of record regarding the statute of limitations facilitate inhumanity with misguided deference to executive authority, which ignores the rule of law, equitable factors, judicial responsibilities and the human (civil) rights of military service members.....**pg 27**

**POINT I : The U.S. Constitution, Federal Statutes and Supreme Court Precedent entitle a member of the U.S. military to judicial review, equitable relief, class action protection and civil rights protection to redress "military" activities violating federal law and military regulations. U.S. Const., Article 3, cl. 2.**

**I. The record shows multiple instances of DOD/DA failure to follow the U.S. Constitution, Geneva Conventions and their own military regulations:**

After the cease-fire agreement of Desert Storm, Petitioner, as Judge Advocate responsible for the legalities of refugee operations, objected to the forced "repatriation" and weaning of @10,000 Iraqi refugees from Saudi Arabia to Iraq. Some of these returnees were shot and killed while being "weaned" from dependency on Coalition forces. APP E, (A64-A81). Petitioner interrupted actions that he perceived to be in violation of the Geneva Conventions IV. APP Q, (A179-A256), pertaining to non-combatants such that all so engaged were involved in a criminal conspiracy or attempt to violate the law of war. See e.g., Provisions of 18 USCS § 2441, APP L, (A158), which provides in relevant part:

> **(a) Offense. Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b),**

**shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.... (c) Definition....."war crime" means any conduct.... (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949.....]**

Article 146 of the Fourth Geneva Convention of 1949 APP Q, (A 246) on the Protection of Civilian Persons in Time of War, requires parties to enact legislation to provide effective penal sanctions for those committing or ordering to commit "grave breaches" of the Convention; and to search for such persons and to bring them to trial. On this issue Article 147 prohibits as grave breaches actions involving:

**....willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in forces of a hostile Power, or willfully depriving a protected person respectively of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.**

The criminal misconduct, refoulement, was also a breach of the Refugee Convention. See, Art 33, Protocol Relating to the Status of Refugees, Nov. 1, 1968, U.S.T. 6223 The United States is not a signatory to the U.N. Refugee Convention itself, but rather to the Protocol, which bound all signatories to comply with the substantive provisions of

Articles 2-34 of the U.N. Refugee Convention. See I.N.S. v. Stevic, 467 U.S. 407, 416, n.9 (1984).

> **Art. 33, of the Protocol Relating to the Status of Refugees states: (1) "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.."**

Current and historical Department of Defense Law of War Programs specifically require the U.S. Armed Forces to comply with international laws of armed conflict. See e.g. U.S. Dep't of Def., Department of Defense Directive Number 5100.77: DoD Law of War Program (Dec. 9, 1998), APP R, (A256-A264)

**DOD Dir 2301.1, DOD Dir 5100.77** APP R, (A256-A264) **and JCSI 5810.01B,** APP U, (A278-A289) incorporate the Geneva Conventions effectively making them among the military law of war regulations referred to below

**II. The U.S. military's compliance or non-compliance with the Geneva Conventions, Whistleblower Protection law, and its own regulations, in a specific case, are legal questions. In this context a Military Service Member's duty to comply with and his or her right to be protected by Treaties, Federal laws and regulations are primarily "legal" (and not military) in nature.**

The Federal Circuit Courts are split with respect to when judicial intervention into military related matters is appropriate and the appropriate nature of judicial relief in such cases. The majority of circuits apply a multi-factor test to determine the reviewability of claims that challenge

internal military decisions. See Mindes v. Seaman 453 F.2d 197 (5th Cir. 1971). Moreover, justiciability analysis, or the primary jurisdiction doctrine, limits the types of claims that service members may bring before the federal courts. Mindes, 453 F.2d 197 at 199.

The Mindes test has not been approved by the Supreme Court. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986). Moreover, the Second Circuit has neither specifically adopted nor followed Mindes but has found that certain discretionary decisions by military officials (within their authority) may not be justiciable. Jones v. New York State Div. of Mil. and Nav. Affairs, 166 F.3d 45, 52, 54 (2d Cir. 1999); Kurlan v. Callaway, 510 F.2d 274, 280 (2d Cir. 1974).

The Supreme Court has never clearly distinguished justiciable from nonjusticiable intramilitary claims for equitable relief. Here the Circuits are also split. See, e.g., Dibble v. Fenimore, 339 F.3d 120, 126, 126-128 (2d Cir. 2003) (federal circuit courts of appeals split as to when intramilitary actions for equitable relief are reviewable).

The Second, Fourth, Fifth, Seventh, Eight, and D.C. Circuit Courts of Appeals allow equitable actions that set forth broad challenges to the constitutionality of military rules or regulations. Dibble, 339 F.3d at 127-28; Scott v. Rice, No. 92-2463, 1993 U.S. App. LEXIS 24641 (4th Cir. Sept. 23, 1993); Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034 (5th Cir. 1986); Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765 (7th Cir. 1993); Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989); Kreis v. Sec'y of the Air Force, 866 F.2d 1508 (D.C. Cir. 1989). The Second Circuit held out the possibility that exceptional circumstances of cases may merit departure from the general rule of nonreviewability of military decisions. Dibble, at 126.

If the U.S. military is in compliance with the Geneva